

ito Vs. Industrial Roadways

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Mar-27-2007

Reported in : (2008)112ITD293(Mum.)

Judge : K Singhal, S Tiwari

Appellant : ito

Respondent : industrial Roadways

Judgement :

1. These three appeals have been filed by the Revenue on 17-02-2005 against the orders of the learned CIT(A)-XIII, Mumbai dated 11-11-2004 in the case of the assessee in relation to assessment orders Under Section 143(3) read with Section 147 for assessment years 1998-99, 1999-2000 and 2000-01. As the common ground and common facts of the case relate to these three appeals they were argued together by the learned departmental representative and the learned Counsel of the assessee. We are deciding these appeals by this common order for convenience.

2. The only dispute involved in these three appeals is deletion of the addition made by the assessing officer on account of freight receipts paid by M/s Ramco Industries Ltd. Facts of the case leading to this dispute briefly are that the learned assessing officer found from TDS certificates issued by M/s Ramco Industries Ltd that the assessee was paid large amounts by way of freight charges. The assessee claimed that he did not earn the freight receipts on which tax was

deducted at source because the assessee acted on commission basis only. The amount of freight received from M/s Ramco Industries was in turn paid by the assessee to a large number of transporters whose services were engaged for transportation of goods belonging to M/s Ramco Industries Ltd. The assessee's function was limited to supply of trucks to M/s Ramco Industries Ltd and such trucks belonged to others and not the assessee.

The assessee only earned commission income. Learned Assessing Officer did not accept this explanation and assessed the gross receipts as per T.D.S. certificates as the assessee's income. On the assessee's appeal learned CIT(A) carried out proceedings Under Section 250(4) of the Act.

He called for elaborate details of accounts where the freight income was recorded. He also called for the records pertaining to parties who supplied trucks for transporting consignments for Ramco Industries Ltd. The assessee was also asked to file confirmation letters or certificates from the truck owners and reconcile the same with the freight account and the commission amount. Learned CIT(A) has observed that the assessee by and large complied with the requirements and on detailed examination of the matter the assessee's explanation was found to be justified. He therefore deleted the additions made by the learned assessing officer based on the gross amounts shown in the TDS certificates issued by M/s Ramco Industries Ltd. 3. During the course of hearing before us the learned departmental representative strongly objected to the impugned order on the ground that it had been made in violation of the provisions of Rule 46A of the Act as well as principles of natural justice that required the learned CIT(A) to confront the assessing officer with the material furnished by the assessee. He relied upon the judgment of Hon'ble Bombay High Court reported in 214 ITR 50 (Bom) in support of his arguments. The learned Counsel for the assessee pointed out that learned CIT(A) had exercised his powers Under Section 250(4) and therefore there was no violation of rule 46A of I.T. Rules.

4. We have carefully considered the rival submissions. In our opinion, having regard to the provisions of Part A of Chapter XX relating to the appeals before the first appellate authority, a distinction has to be made between the evidence and

material voluntarily furnished by an assessee in support of his appeal and the evidence / material requisitioned from an assessee by the first appellate authority with a view to proper disposal of proceedings before him. In our opinion while the provisions of rule 46A apply to the former, the same have no application to the latter.

5. Rule 46A of I.T. Rules has been inserted by the Income-tax (Second Amendment) Rules, 1973 with effect from 01-04-1973. This rule provides that an assessee shall not be entitled to produce before the first appellate authority evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the assessing officer. Rule however enumerate certain exceptional circumstances such as where the assessing officer has refused to admit evidence which ought to have been admitted or where the assessee was prevented by sufficient cause from producing the evidence he was called upon to produce by the assessing officer or which is otherwise relevant to any ground of appeal taken by the assessee or where the assessment order itself is made without giving sufficient opportunity to the assessee to adduce evidence relevant to any ground of appeal. Provision of rule 46A enjoins upon the first appellate authority not to admit any fresh evidence unless he records in writing his reasons for its admission. Further rule 46A enjoins upon him to provide the assessing officer a reasonable opportunity to examine the fresh evidence or to cross examine the witness produced by the assessee or to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the assessee.

6. The provisions of Section 250(4), on the other hand, empower the first appellate authority to make such further enquiry as he thinks fit or to direct the assessing officer to make further enquiry and report the result of the same. The provisions of Section 250(4) are the provisions of long standing that existed under 1922 Act also in Section 31 of that Act. In the case of CIT v. Kanpur Coal Syndicate 53 ITR 225 (SC) the Hon'ble Supreme Court have held that the first appellate authority can do what the assessing officer could do and can also direct the latter to do what the latter has failed to do. In the case of Jute Corporation of India Ltd v. CIT 187 ITR 688 (SC) and in the case of CIT v. Nirbheram Daluram 224 ITR 610 (SC) the

Hon'ble Supreme Court have held that the powers of the first appellate authority over an assessment are all pervasive and they are not confined to the matters considered by the assessing officer. There are many judgments to the effect that in view of the provisions of Section 250(4) the first appellate authority is duty bound to make an enquiry even if such enquiry was not made by the assessing officer if the facts and circumstances of the case warrant such an enquiry to be made. Reference in this regard may be made to the judgments reported in 107 ITR 808 (Ker); 204 ITR 580 (Cal); 231 ITR 1 (Bom) and 36 Taxman 353 (Del). It therefore follows that the matters to be considered by the first appellate authority need not be confined to what was considered by the assessing officer while making the order appealed against.

7. The provisions of Rule 46A promulgated with effect from 01-04-1973 were challenged as being ultra vires to the provisions of Sections 250 and 251 of the Act in the case of Smt. Mohinder Kaur v. Central Government 104 ITR 120 (All). After consideration of the provisions of Sections 250 and 251 of the Act as well as Rule 46A of I.T. Rules the Hon'ble High Court arrived at the conclusion in the following words: Sub-rule (1) of the said rule lays down the circumstances in which alone the appellant is entitled to produce additional evidence.

Sub-section (4) preserves the power of the Appellate Assistant Commissioner to make further inquiry as contemplated by Section 250 of the Act. Thus, it is clear that no part of rule 46A whittles down or impairs the power to make further inquiry conferred upon the Appellate Assistant Commissioner by Section 250 of the Act.

Similarly, Sub-section (5) of the said section confers a power on the Appellate Assistant Commissioner to permit the appellant to raise a fresh point. This power has not been even touched by rule 46A. Previously, the appellant had no right to adduce additional evidence. The Appellate Assistant Commissioner could permit the production of additional evidence if he thought it was necessary to enable him to dispose of the appeal, or if he thought it fit to make further inquiry; but under Sub-rule (1) of rule 46A the appellant had a right to produce additional evidence in the circumstances mentioned in its various clauses.

We are unable to agree with the submission that rule 46A or its sub clauses is ultra vires Section 250 or 251 of the Act. The rule does not affect the power of the Appellate Assistant Commissioner conferred upon him by that rule. It in addition gives a right to the appellant in the matter of production of additional evidence.

8. Similar issue came for consideration by Hon'ble Kerala High Court in the case of CIT v. K Ravindranathan Nair 265 ITR 217 (Ker). Hon'ble High Court held that the provisions of Sub-rule (4) of rule 46A laid down that the powers of the appellate authority Under Section 250 was not affected. The Hon'ble Kerala High Court further observed " On a consideration of the provisions of rule 46A particularly Sub-rule (4) thereof and the provisions of Section 250(1) of the Income-tax Act conferring power on the Commissioner of Income-tax (Appeals), we are also of the view that in spite of the provisions of rule 46A(1), the provisions of Section 250 enable the Commissioner of Income-tax (Appeals) to accept additional evidence in appropriate cases which power has been preserved by Sub-rule (4) of rule 46A also. If the provisions of rule 46A, Sub-rule (4) thereof, are held to be mandatory that will go against the provisions of Section 250 of the Act conferring power on the first appellate authority to enquire into the matter and pass appropriate orders. In other words, rule 46A without Sub-rule (4) will be open to challenge as ultra vires Section 250 of the Act." 9. There are of course several judgments where it has clearly been laid down that the assessee on his own cannot produce any additional evidence not furnished before the assessing officer without meeting the various conditions provided under rule 46A for which satisfaction is to be recorded by the appellate authority in writing and with which the appellate authority is further required to confront the assessing officer and allow him reasonable opportunity to have his say in the matter. In the case of Rajkumar Srimal v. CIT 102 ITR 525 (Cal) the Hon'ble Calcutta High Court have clearly held that where the CIT is not acting suo motu in admitting additional evidence, there must be some ground for admitting new evidence. The Hon'ble Calcutta High Court have further observed that in such a case the Tribunal can interfere with the discretion exercised by the first appellate authority in admitting the additional evidence. In the words of Hon'ble High Court "It is true, as was contended by counsel for the assessee, that the Appellate Assistant Commissioner has very wide powers and in the interests of justice he can make further enquiry and he can admit new ground of appeal. He

can also give deductions not claimed by the assessee, as was held by this Court in the case of Union Coal Co. Ltd. v. Commissioner of Income tax. In this case counsel for the revenue also did not dispute that in certain circumstances the Appellate Assistant Commissioner had jurisdiction to admit new grounds if it was necessary to admit new evidence. The point in this case is not whether the Appellate Assistant Commissioner is entitled to admit new ground or evidence either suo motu or at the invitation of the parties. In this case it is apparent that the Appellate Assistant Commissioner was not acting suo moto in admitting additional evidence. If the Appellate Assistant Commissioner was acting on being invited by the assessee, then there must be some ground for admitting new evidence in the sense that there must be some explanation to show that the failure to adduce evidence earlier sought to be adduced before the Appellate Assistant Commissioner was not willful and not unreasonable. We find from the record that no such explanation was ever offered or referred to. If without any explanation at all the Appellate Assistant Commissioner admits evidence at the invitation of the parties, he would be exercising, in our opinion, discretion not properly. He has undoubtedly a discretion vested in him to admit additional evidence in appropriate cases but admission of evidence at the instance of an appellant without any ground or explanation would not be exercising discretion properly and in such a case the appellate authority is competent, in our opinion, to interfere with the discretion exercised by the Appellate Assistant Commissioner. Reliance in this connection may be placed on the observations in the case of Ramgopal Ganpatrai Sons Ltd. v. Commissioner of Excess Profits Tax, in the case of Byramji Co. v. Commissioner of Income tax and in the case of Karamchand v. Commissioner of Income tax." 10. In the case of CIT v. Vali Mohamed Ahmedbhai 134 ITR 214 (Guj) Hon'ble Gujarat High Court have held that if any additional evidence submitted by an assessee is accepted behind the back of the assessing officer and the assessing officer is not given proper opportunity to rebut the same, it would amount to the violation of the principles of natural justice. Hon'ble Gujarat High Court observed: It is clear from the above quoted provision that the AAC should not have taken into account any evidence produced under Sub-rule (1) unless the ITO had been allowed a reasonable opportunity to examine the evidence or to cross examine the witness whose evidence was taken on record or

to produce any evidence in rebuttal of the additional evidence produced by the assessee. It is, therefore, obvious that the AAC could not have relied on the additional evidence without giving such opportunity to the ITO. The mere fact that notice of hearing of the appeal was given to the ITO would not meet the requirements of the above rule. Even if no such rule was in existence, ends of justice and fair play demand that when an assessee produces additional evidence in his appeal an opportunity is given to the ITO to test the evidence or to counter the effect of the evidence by producing evidence in rebuttal or otherwise. The reason is self evident. It stands to reason to presume that the ITO took his decision not to remain present because he considered it unnecessary to do so in the context of the existing record. He could not have anticipated or reasonably foreseen that the record was going to be augmented by adducing fresh evidence. Besides, he had a right to object to the production of additional evidence. Since something adverse to the ITO was sought to be done in the course of the appeal by way of augmenting the record, the ITO ought to have been heard and given an opportunity to meet with the additional material by way of cross examination, counter evidence and urging submissions in the context of the augmented record. Of course, if the appeal was going to be decided on the basis of the existing record of which he had notice, no such question could arise and no grievance could be made as the ITO had failed to exercise his option to remain present. He had no notice of the application for additional evidence as no notice was issued. When a prayer for additional evidence was made, it was an independent and substantive application seeking a new right. Notice of such application was necessary to the ITO and he ought to have been afforded both an opportunity to oppose it and to test the additional evidence or counter the effect thereof or produce evidence in rebuttal. No such order granting the request could have been passed behind the back of the ITO in violation of the principles of natural justice. At the cost of repetition, it be stated that notice of appeal cannot be equated with notice of a future application to lead additional evidence which no one could have anticipated or reasonably foreseen. Ordinarily, the appeal would be decided on the evidence recorded in the course of assessment proceedings. The ITO, therefore, may not, in a given case, think it necessary to remain present at the hearing of the appeal. He, however, cannot be expected to anticipate that additional evidence might be

produced by the assessee in his appeal.

It is for this reason that it is necessary to give him an opportunity to meet the additional evidence. The Tribunal has, therefore, fallen into an error in rejecting the plea of the revenue that the AAC ought to have given an opportunity to the ITO to examine the additional evidence or to cross examine the witnesses whose evidence was taken on record or to rebut the additional evidence. We, therefore, answer the question referred to us in the negative and against the assessee.

11. The proposition that the first appellate authority can admit additional evidence sought to be filed by an assessee only for good reasons and after allowing the assessing officer reasonable opportunity to have his say in the matter is supported by some more judgments such as CIT v. Babulal Jain 176 ITR 411 (MP); C. Unnikrishnan v. CIT 233 ITR 485 (Ker); and Ramprasad Sharma v. CIT 119 ITR 867 (All).

12. In the case of Smt. Prabhavati Shah v. CIT 231 ITR 1 (Bom) Hon'ble jurisdictional High Court dealt with a case where the assessee sought to produce fresh evidence before the first appellate authority for no good reasons for not having produced the same before the assessing officer. Referring to the provisions of rule 46A the Hon'ble Bombay High Court held that the first appellate authority was justified in not taking on record the fresh evidence sought to be produced before him by the assessee. In the course of the judgment Hon'ble High Court closely examined the provisions of Section 250(4) of the Act and the provisions of rule 46A and observed as under: On a plain reading of rule 46A, it is clear that this rule is intended to put fetters on the right of the appellant to produce before the Appellate Assistant Commissioner any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the Income-tax Officer, except in the circumstances set out therein. It does not deal with the powers of the Appellate Assistant Commissioner to make further enquiry or to direct the Income-tax Officer to make further enquiry and to report the result of the same to him. This position has been made clear by Sub-rule (4) which specifically provides that the restrictions placed on the production of additional evidence by the appellant would not affect the powers of the Appellate Assistant

Commissioner to call for the production of any document or the examination of any witness to enable him to dispose of the appeal.

Under Sub-section (4) of Section 250 of the Act, the Appellate Assistant Commissioner is empowered to make such further inquiry as he thinks fit or to direct the Income-tax Officer to make further inquiry and to report the result of the same to him. Sub-section (5) of Section 250 of the Act empowers the Appellate Assistant Commissioner to allow the appellant, at the hearing of the appeal, to go into any ground of appeal not specified in the grounds of appeal, on his being satisfied that the omission of the ground from the form of appeal was not wilful. It is clear from the above provisions that the powers of the Appellate Assistant Commissioner are much wider than the powers of an ordinary court of appeal. The scope of his powers is coterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do. He can also direct the Income-tax Officer to do what he failed to do. The power conferred on the Appellate Assistant Commissioner under Sub-section (4) of Section 250 being a quasi-judicial power, it is incumbent on him to exercise the same if the facts and circumstances justify. If the Appellate Assistant Commissioner fails to exercise his discretion judicially, and arbitrarily refuses to make enquiry in a case where the facts and circumstances so demand, his action would be open for correction by a higher authority.

Thereafter the Hon'ble High Court again observed at page 8 in the following words: On a conjoint reading of Section 250 of the Act and rule 46A of the rules, it is clear that the restrictions placed on the appellant to produce evidence do not affect the powers of the Appellate Assistant Commissioner under Sub-section (4) of Section 250 of the Act. The purpose of rule 46A appears to be to ensure that evidence is primarily led before the Income-tax Officer.

13. From the various authorities cited by us (supra) in this order we find that the legal position is that the first appellate authority has wide powers over the order of assessment appealed against before him.

In the course of exercise of such power the first appellate authority can direct the assessee to produce any evidence, information or material that was not produced before or considered by the assessing officer. The purpose of rule 46A is to place

fetters on the rights of an appellant to produce additional evidence before the first appellate authority and not the rights of the first appellate authority to call for production of any fresh evidence or information. This aspect of the provisions of rule 46A is clear from the provisions of Sub-rule (4) of rule 46A itself that nothing contained in rule 46A shall affect the power of first appellate authority to direct the production of any document or examination of any witness to enable him to dispose of the appeal or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the assessing officer). As against the judicial pronouncements supra we see no assistance to the case of revenue from the judgment of hon'ble Bombay High Court in the case of Gammon India Ltd. 214 ITR 50 (Bom) relied upon by learned DR. That is a case related to the proceedings under Section 154 and therefore it was held that the Appellate Assistant Commissioner had no powers to consider what was not on record.

14. In the instant case the entire additional evidence has come on the record of the first appellate authority because the first appellate authority decided to examine the facts of the case in depth and adjudicate upon the matter on the basis of evidence and material thus gathered. The learned CIT(A) was empowered to do so under the provisions of Section 250(4). The results of enquiry conducted by him could either go to further cement the case made out by the assessing officer or to help out the assessee against the findings of the assessing officer. The mere fact that the results of the enquiries thus conducted supported the case of the assessee and not that of Revenue has no bearing on the jurisdiction and powers of the learned CIT(A).

The learned CIT(A) could have confronted the assessing officer with the evidence thus received and the material thus gathered and allow the assessing officer to have his say in the matter and perhaps had he done so this dispute would not have arisen. But we do not see any requirement in law that the first appellate authority should invariably consult or confront the assessing officer every time an additional evidence that was not before the assessing officer comes on the record of the first appellate authority. Where the additional evidence is obtained by the first appellate authority on its own motion, there is no requirement in law to consult

/ confront the assessing officer with such additional evidence. There may be cases where additional evidence is admitted by the first appellate authority on a request or application being made by the assessee. In such cases Sub-rule (2) of rule 46A requires the first appellate authority to allow the assessing officer a further opportunity to rebut the fresh evidence filed by the assessee. Even that requirement cannot be said to be a rule of universal application. If the additional evidence furnished by the assessee before the appellate authority is in the nature of clinching evidence leaving no further room for any doubt or controversy in such a case no useful purpose would be served on performing the ritual of forwarding the evidence / material to the assessing officer and obtain his report. In such exceptional circumstances the requirement of Sub-rule (3) may be dispensed with.

15. In view of the discussion in the foregoing paragraph we see no infirmity in the impugned order of the learned CIT(A) who has taken pains to examine the issue before him comprehensively and arrive at a correct finding of fact and should be congratulated for having done so.

We therefore uphold his order and dismiss these three appeals filed by the Revenue.

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